Filed 6/28/10 Fuss-McCullough v. Nike, Inc. CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

JUSTIN FUSS-MCCULLOUGH, a Minor, etc., et al Plaintiffs and Appellants, v. NIKE, INC., et al, Defendants and Respondents.	B210930 (Los Angeles County Super. Ct. No. YC053815)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ramona G. See, Judge. Affirmed.

Law Offices of Baker & Oring and John M. Inferrera for Plaintiffs and Appellants.

K&L Gates, Fred D. Heather and Michael J. Heyman for Defendants and Respondents.

INTRODUCTION

Plaintiff and appellant Justin Fuss-McCullough (Justin) was hit in the head by a baseball while at bat. Justin was wearing a helmet distributed by defendant and respondent Nike, Inc. (Nike) and sold by defendant and respondent Big 5 Sporting Goods Corporation (Big 5). Justin's mother, plaintiff and appellant Jennifer McCullough (Jennifer), witnessed the incident. Plaintiffs sued defendants for personal injuries. They claimed that the Nike helmet was defectively designed and that defendants were strictly liable for their damages. A jury, however, rendered a verdict in defendants' favor, and then the trial court entered judgment for defendants. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Incident*

On September 12, 2004, Justin and his stepfather purchased a Nike baseball helmet at a Big 5 store. Less than three hours later, Justin used that helmet at a baseball game. Justin was 13 years old at the time.

During his first at bat a pitch struck the dome of Justin's helmet and bounced off. Justin took a few steps towards first base, and then stopped. He was bleeding from his forehead, which had a laceration. Justin's coach and other adults rushed to his aid. Jennifer witnessed the incident.

Plaintiffs contend that the helmet Justin was wearing fractured when it was hit by the baseball. Defendants dispute that contention.

2. *Plaintiffs' Alleged Injuries*

After the incident, Justin was taken to the emergency room of a hospital. He received stitches on his forehead and was sent home. The laceration on Justin's forehead left a scar.

The parties dispute the nature and extent of Justin's injuries and damages. Plaintiffs testified that, as a result of the incident, the following occurred: (1) Justin suffered from headaches and had difficulty concentrating in school and in general; (2) Justin was teased about his stitches and scar on his forehead; (3) Justin was more "timid" when he played baseball; (4) although he played football after the incident, Justin

"mostly" played as a kicker; and (5) Justin was forced to repeat seventh grade because he missed classes after the incident.

Conversely, defendants produced evidence showing the following: (1) four days after the incident Justin denied to his family doctor that he suffered from dizziness, nausea, or headaches ; (2) after the incident Justin played football as a lineman; (3) Justin did not report any problems relating to the incident to his family doctor during an examination in August 2006 to clear him to play football; (4) as a freshman in high school, Justin played for the varsity baseball team and as a sophomore he had a batting average of 402; and (5) there was no academic or disciplinary reason for Justin to repeat the seventh grade, and the only other two students who repeated the seventh grade in his school were also baseball players.

3. *Plaintiffs' Complaint*

On September 5, 2006, plaintiffs filed a complaint against defendants. Plaintiffs asserted negligence, strict liability, and breach of warranty causes of action.[1] Plaintiffs alleged that as a result of the incident, Justin and Jennifer suffered "severe and permanent" injuries.[2]

4. *Defendants' Supplemental Designation of a Medical Witness*

About a year after plaintiffs commenced this action, on August 30, 2007, plaintiffs were given mental health examinations and tests by Roger Light, Ph.D. Justin was diagnosed as having chronic post traumatic stress syndrome, depressive symptoms and a degree of generalized anxiety. Jennifer was diagnosed as having moderate to severe depression, anxiety symptoms and chronic post traumatic stress syndrome.

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[1] As we shall explain, plaintiffs only pursued a strict liability cause of action at trial. Although the complaint alleged the helmet had both design and manufacturing defects, plaintiffs only presented a design defect claim to the jury.

[2] Less than a month before the complaint was filed, on August 8, 2006, Justin was examined by his family doctor, Dr. Lee Gary Kissel, for the purpose of getting approval to play football. At that time, Justin did not advise Dr. Kissel about any problems or symptoms from being hit with a baseball.

On September 24, 2007, defendants filed a supplemental designation of expert witnesses, wherein they designated Daniel B. Auerbach, M.D. Dr. Auerbach was designated to testify regarding Dr. Light's findings.

5. *Defendants' Mental Examinations of Plaintiffs*

On September 26, 2007, defendants filed an ex parte application to continue the trial from October 9, 2007, to a later date, and to reopen discovery to allow for mental examinations. This application was granted on October 2, 2007, over plaintiffs' objections.

On November 13, 2007, plaintiffs appeared at the office Dr. Andrew Woo for mental examinations.[3] While Justin was in a room with Dr. Woo, one of defendants' attorneys, Timothy Fredricks, was present. This alarmed Jennifer, who called her counsel and advised him of Mr. Fredricks's presence. Upon advice of counsel, Jennifer interrupted the examination and left Dr. Woo's office with Justin. Mr. Fredricks was in the room with Justin for about eight to nine minutes, and did not communicate with him during that time. During their visit at Dr. Woo's office, another defense lawyer, Fred Heather, briefly met plaintiffs, and shook their hands. Other than introducing himself, Heather had no ex parte communications with plaintiffs.

In December 2007, plaintiffs and defendants both filed motions relating to the aborted mental examinations. Plaintiffs argued that defense counsel should not have been present during the mental examinations, and sought a protective order, evidentiary sanctions, monetary sanctions and disqualification of defendants' counsel. Defendants sought an order compelling plaintiffs to appear for mental examinations and monetary sanctions. On January 29, 2008, the trial court ordered Justin and Jennifer to appear for mental examinations by Dr. Edwin Amos. No sanctions were awarded to either side and no protective order was issued.

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[3] The trial court's October 2, 2007, order stated that plaintiffs were to appear before Dr. Auerbach for mental examinations. The record does not indicate why the initial mental examinations were conduct by Dr. Woo.

6. *Defendants' Unverified Responses to Requests for Admission*

On May 23, 2008, defendants' counsel informed plaintiffs' counsel that certain defendants' responses to requests for admission would be "withdrawn" because they were not verified. By then, the deadline to file a discovery motion had passed. (See fn. 8, *post*.)

On May 27, 2008, plaintiffs filed a motion to prevent defendants from withdrawing their responses to plaintiffs' requests for admission, and defendants filed a motion in limine to exclude defendants' unverified responses to plaintiffs' requests for admission. On the first day of trial, May 30, 2008, the court denied plaintiffs' motion and granted defendants' motion. The court reasoned that plaintiffs' motion was effectively an untimely request to deem their requests for admissions admitted.

7. *Plaintiffs' Motion in Limine to Exclude Non-Designated Expert Witnesses*

Prior to trial, the only expert defendants designated was David Halstead. However, defendants' counsel informed plaintiffs' counsel that defendants intended to call Tack Lam, M.D. and Rob Carnehan, M.S., P.E., to testify as expert witnesses. In response, plaintiffs filed a motion in limine to exclude the expert testimony of Dr. Lam and Mr. Carnehan. Defendants opposed the motion on the grounds that Dr. Lam and Mr. Carnehan were merely rebuttal witnesses who would testify to impeach the anticipated factual assertions by plaintiffs' experts.

The trial court held a hearing on the matter pursuant to Evidence Code section 402. After that hearing, the trial court granted plaintiffs' motion with respect to Mr. Carnehan, but denied it with respect to Dr. Lam. The court stated that Dr. Lam could testify to impeach plaintiffs' witnesses.

8. *Defendants' Special Jury Instructions*

Defendants requested a number of special injury instructions, three of which are at issue here: (1) "Being hit by a pitch is an inherent risk of baseball"; (2) "The dangers of being hit by a pitch are apparent and well known: being hit can result in serious injury or, on rare tragic occasions, death"; and (3) "A defendant owes no duty of care to eliminate the inherent risks in a particular sport voluntarily played by the plaintiff."

Plaintiffs objected to these three special jury instructions. The trial court approved them and gave them to the jury.

9. *The Trial Court Declines to Give the Jury an Instruction Regarding the Consumer Expectations Test*

Plaintiffs requested that the trial court present to the jury the Judicial Council's California Civil Jury Instruction (CACI) No. 1203, which related to the consumer expectations test for design defects.[4] The court declined to present CACI No. 1203 to the jury. Instead, the court presented CACI No. 1204, which sets forth the risk-benefit test for design defects.[5]

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[4] In 2008, former CACI No. 1203 provided: "[*Name of plaintiff*] claims the [*product*]'s design was defective because the [*product*] did not perform as safely as an ordinary consumer would have expected it to perform. To establish this claim, [*name of plaintiff*] must prove all of the following: [¶] 1. That [*name of defendant*] [manufactured/distributed/sold] the [*product*]; [¶] 2. [That, at the time of the use, the [*product*] was substantially the same as when it left [*name of defendant*]'s possession;] [¶] [*or*] [¶] [That any changes made to the [*product*] after it left [*name of defendant*]'s possession were reasonably foreseeable to [*name of defendant*];] [¶] 3. That the [*product*] did not perform as safetly as an ordinary consumer would have expected at the time of use; [¶] 4. That the [*product*] was used [or misused] in a way that was reasonably foreseeable to [*name of defendant*]; [¶] 5. That [*name of plaintiff*] was harmed; and [¶] 6. That the [*product*]'s failure to perform safely was a substantial factor in causing [*name of plaintiff*]'s harm."

[5] CACI No. 1204, as modified by the court, stated the following: "Justin Fuss-McCullough claims that the helmet's design caused harm [to him]. To establish this claim, Justin Fuss-McCullough must prove all of the following: [¶] 1. That Nike, Inc. manufactured the helmet; [¶] 2. That any changes made to the helmet after it left Nike, Inc.'s possession were reasonably foreseeable to Nike, Inc.; [¶] 3. That the helmet was used or misused in a way that was reasonably foreseeable to Nike, Inc.; and [¶] 4. That the helmet's design was a substantial factor in causing harm to Justin Fuss-McCullough. [¶] If Justin Fuss-McCullough has proved these four facts, then your decision on this claim must be for Justin Fuss-McCullough unless Nike, Inc. proves that the benefits of the design outweigh the risks of the design. In deciding whether the benefits outweigh the risks, you should consider the following . . . ."

10. *The Trial*

At the trial, Jesa Kreiner, Ph.D., testified as an expert witness on behalf of plaintiffs. Dr. Kreiner did not contend that a baseball helmet could be designed to prevent all head injuries.[6] Rather, he conceded that the purpose of a helmet is to protect against the most serious injuries.

Dr. Kreiner did *not* contend that the helmet was designed defectively because it fractured or cracked upon impact. Instead, Dr. Kreiner opined that the helmet was defectively designed because there was no protective padding under the bill of the helmet. Dr. Kreiner stated that such padding would have prevented the laceration on Justin's forehead when the helmet fractured. Although Dr. Kreiner did not have experience designing baseball helmets, he opined that "anybody who has an engineering/scientific/application-minded systematic approach could have identified the design issues here and addressed them."

Dr. Kreiner assumed in his testimony that (1) the helmet Justin was wearing when he was hit by a baseball on September 12, 2004, was fractured or cracked by the impact of the baseball; (2) the crack on the bill of the helmet caused the laceration on Justin's forehead; and (3) the helmet presented into evidence as Exhibit 1 was the helmet that Justin was wearing when the incident occurred. In response to Dr. Kreiner's testimony, defendants called Dr. Lam as an expert witness. Dr. Lam opined that (1) it was "unlikely" that the helmet Justin was wearing when he was hit by a baseball on September 12, 2004, was fractured or cracked by the impact of the baseball; (2) if the helmet was fractured or cracked, it did not cause a laceration on Justin's forehead; and

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[6] The label on the Nike helmet plaintiff claims he was wearing when the incident occurred stated the following: "No helmet can prevent all head injuries or any other injuries a player might receive while participating in baseball or softball. Severe head or neck injury, including paralysis or death, may occur to you despite using this helmet. Do not use this helmet if the shell is cracked or distorted or if the interior padding has deteriorated."

(3) the helmet presented into evidence as Exhibit 1 was "unlikely" to be the helmet Justin was wearing when the incident occurred.

During the trial the deposition of defendants' expert David Halstead was read. Mr. Halstead, an engineer who tested Nike baseball helmets for safety, stated that the National Operating Committee on Standards for Athletic Equipment standard for baseball helmets anticipates fractures of the helmet when the helmet is struck by a baseball at a high velocity because such fractures distribute the energy of the ball, thereby reducing the chances of injury to the baseball player. According to Mr. Halstead, a helmet that never fractured could cause greater injury to the player.

Mr. Halstead further stated that he did not believe that there should be padding placed to the edge of a helmet's bill, as Dr. Kreiner suggested. Mr. Halstead opined that such padding would become a hazard in its own right because there was a danger that it could fall and block the player's vision.

With respect to the incident at issue, Mr. Halstead stated: "This young man [Justin] does not have a brain injury. He was struck in the head with a 60 to 80 mile an hour pitch. He does not have a brain injury, applause for Nike's helmet."

After the matter was submitted to the jury, the jury asked the court the following question: "Does [the] helmet design ref[er] to the bill or the [dome] or [the] entire helmet[?]" The court responded: "The entire helmet."

Shortly thereafter, the jury returned a special verdict. The jury found that the helmet used by Justin when he was injured was distributed by Nike and sold by Big 5. It further found that the helmet was used in a way that was reasonably foreseeable to defendants and that the helmet's design was a substantial factor in causing harm to Justin. However, the jury found that the risks of the helmet's design did not outweigh the benefits of the design.

The trial court thus entered judgment for defendants and against plaintiffs. This appeal followed.

CONTENTIONS

Plaintiffs make eight arguments. First, plaintiffs contend that the trial court erroneously failed to instruct the jury regarding the consumer expectations test. Second, they contend that the trial court erroneously allowed Dr. Lam, a non-designated expert witness, to testify. Third, they contend that the trial court erroneously allowed defendants to withdraw their requests for admission. Fourth, plaintiffs argue that the trial court erroneously gave the jury defendants' special jury instructions 1, 2 and 3. Fifth, plaintiffs contend that the trial court committed reversible error in the manner in which it answered the jury question relating to the definition of the product. Sixth, plaintiffs contend that the trial court erroneously allowed the jury to make a risk-benefit analysis when defendants allegedly provided no risk-benefit testimony. Seventh, they argue that the court abused its discretion by not issuing monetary sanctions and disqualifying defense counsel for being present at plaintiffs' mental examinations. Finally, plaintiffs contend that the trial court erroneously allowed defendants to conduct mental examinations of plaintiffs and erroneously allowed defendants to add a medical witness. We shall address each argument in turn.

DISCUSSION

1. *The Trial Court's Refusal to Give CACI No. 1203 On the Consumer Expectations Test Was Not Error*

There are two alternative tests for identifying a design defect. A design is defective if (1) the product does not perform "as safely as an ordinary consumer would expect when used in an intended and reasonably foreseeable manner" (consumer expectations test); *or* (2) "on balance the benefits of the challenged design outweighed the risk of danger inherent in the design" (risk-benefit test). (*Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 Cal.3d 987, 995; accord *Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 430.)

The courts use one of these two alternative tests depending on the facts of the case. The consumer expectation test may be used when expert testimony is unnecessary. "In particular circumstances, a product's design may perform so unsafely that the defect is apparent to the common reason, experience, and understanding of its ordinary consumers. In such cases, a lay jury is competent to make that determination." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 569 (*Soule*).)

The consumer expectation test is not appropriate in all cases. The test "is reserved for cases in which the *everyday experience* of the product's users permits a conclusion that the product's design violated *minimum* safety assumptions, and is thus defective *regardless of expert opinion about the merits of the design*. It follows that where the minimum safety of a product is within the common knowledge of lay jurors, expert witnesses may not be used to demonstrate what an ordinary consumer would or should expect. Use of expert testimony for that purpose would invade the jury's function (see Evid. Code, § 801, subd. (a)), and would invite circumvention of the rule that the risks and benefits of a challenged design must be carefully balanced whenever the issue of design defect goes beyond the common experience of the product's users. [Fn. omitted.]" (*Soule*, *supra*, 8 Cal.4th at p. 567.)

In *Soule*, our Supreme Court gave examples of when the consumer expectation test applied to alleged defects in automobiles. Ordinary consumers expect that their vehicles "will be designed so as not to explode while idling at stoplights, experience sudden steering or brake failure as they leave the dealership, or roll over and catch fire in two-mile-per-hour collisions." (*Soule, supra*, 8 Cal.4th at p. 566, fn. 3.) However, "the ordinary consumer of an automobile simply has 'no idea' how it should perform in all foreseeable situations, or how safe it should be made against all foreseeable hazards." (*Id.* at p. 567; accord *Pruitt v. General Motors Corp.* (1999) 72 Cal.App.4th 1480, 1483 ["The deployment of an air bag is, quite fortunately, not part of the 'everyday experience' of the consuming public"].)

A jury instruction on the consumer expectations test is "not appropriate where, as a matter of law, the evidence would not support a jury verdict on that theory. Whenever that is so, the jury must be instructed solely on the alternative risk-benefit theory of design defect . . . . " (*Soule, supra,* 8 Cal.4th at p. 568; accord *Morson v. Superior Court* (2001) 90 Cal.App.4th 775 [consumer expectation test was not appropriate in case involving allegedly defectively designed latex gloves].)

Plaintiffs argue that the trial court should have presented to the jury CACI No. 1203, which sets forth the consumer expectation test.[7] For purposes of determining whether the trial court's refusal to give CACI No. 1203 to the jury was erroneous, we must review the evidence in a light most favorable to plaintiffs. (*Logacz v. Limansky* (1999) 71 Cal.App.4th 1149, 1157.)

Here, the performance of the Nike helmet was not part of the "everyday experience" of the consuming public. The ordinary consumer of a baseball helmet simply has no idea how it will perform in all foreseeable situations, or how safe it should be against all foreseeable hazards. In particular, whether a helmet should fracture and, if so, under what circumstances it should fracture are not matters within common knowledge. Indeed, the fact that by fracturing a helmet is *safer* under certain circumstances may be counterintuitive to many ordinary people.

Even more removed from the everyday experience of ordinary consumers is how a helmet should perform once it fractures in accordance with its design. Plaintiffs' own expert witness could not describe precisely how Justin was cut and could not cite another example of a similar accident. Defendants' expert David Halstead, who had many years of experience testing and working with baseball helmets, knew of only one other case where a helmet fractured and cut a player.

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[7] See footnote 4, *ante*.

Whether a baseball player should expect to receive a cut on his forehead after his helmet is fractured is beyond the common reason, experience, and understanding of ordinary consumers. The trial court thus correctly denied the use of the consumer expectations test for an alleged design defect. The risk-benefit test was appropriately used.

2. *The Trial Court Did Not Commit Reversible Error By Allowing Dr. Lam To Testify*

"A party may call as a witness at trial an expert not previously designed by that party if . . . [¶ . . .¶] [t]hat expert is called as a witness to impeach the testimony of an expert witness offered by any other party at the trial. This impeachment may include testimony to the falsity or nonexistence of any fact used as the foundation for any opinion by any other party's expert witness, but may not include testimony that contradicts the opinion." (Code Civ. Proc., § 2034.310, subd. (b).)

Here, Dr. Lam's testimony was used to impeach three foundation facts assumed by plaintiffs' expert, Dr. Kreiner: (1) the helmet Justin was wearing when he was hit by a baseball on September 12, 2004, was fractured or cracked by the impact of the baseball; (2) the crack on the bill of the helmet caused the laceration on Justin's forehead; and (3) the helmet presented into evidence as Exhibit 1 was the helmet that Justin was wearing when the incident occurred. Accordingly, Dr. Lam was permitted to testify regarding these matters as an expert witness even though he was not designated as an expert when the parties exchanged information regarding their respective experts.

Moreover, a jury verdict and judgment based thereon cannot be reversed by reason of the erroneous admission of evidence unless the error resulted in a miscarriage of justice. (Evid. Code, § 353, subd. (b).) This means that it is reasonably probable that a result more favorable to plaintiffs would have been reached in the absence of the error. (*Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547, 557.)

Here, plaintiffs failed to show a miscarriage of justice. Indeed, the jury apparently rejected Dr. Lam's testimony because it found that the design of the Nike helmet was a substantial factor in causing harm to Justin. Accordingly, even assuming the trial court's decision allowing Dr. Lam to testify was erroneous, such an error is not a reason to reverse the judgment.

3. *The Trial Court's Order Granting Defendants' Motion in Limine to Exclude Its Unverified Responses to Plaintiffs' Requests for Admission Was Not Erroneous*

In August 2007, defendants served their unverified responses to plaintiffs' requests for admission. Unverified responses to requests for admission are "tantamount to no responses at all." (*Appleton v. Superior court* (1988) 206 Cal.App.3d 632, 636.) Plaintiffs' remedy was to move for an order that the truth of the matters specified in the requests be deemed admitted. (Code Civ. Proc., § 2033.280, subd. (b).) However, plaintiffs failed to file such a motion in a timely manner.

Because the trial began on May 30, 2008, the deadline for a hearing on a motion to deem plaintiffs' requests for admission admitted was, at the latest, May 15, 2008.[8] But plaintiffs did not file their motion to "prevent defendant from withdrawing requests for admissions and/or in the alternative deeming all the requests for admissions admitted" until May 27, 2008, well past the deadline. Accordingly, the trial court correctly concluded that plaintiffs' motion was untimely. The trial court further correctly granted defendants' motion in limine to exclude their unverified responses to plaintiffs' requests for admission because such responses were tantamount to no responses at all.

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[8] It is unclear from the record precisely when the deadline for plaintiffs to file a discovery motion occurred. As a general rule, a hearing on a discovery motion must be set on or before the 15th day before the date initially set for the trial of the action. (Code Civ. Proc., § 2024.020, subd. (a). However, if a new trial date is set, on motion of any party, the court may grant leave to conduct additional discovery and set a new deadline for a discovery motion to be heard. (*Id.* at §§ 2024.020, subd. (b), 2024.050, subd. (a).) In this case, the initial trial date and the initial discovery cut-off date were both postponed.

4. *The Trial Court Did Not Commit Reversible Error By Giving the Jury Special Jury Instructions 1, 2 and 3*

As we previously explained, defendants requested, and the trial court gave, the following special jury instructions: (1) "Being hit by a pitch is an inherent risk of baseball"; (2) "The dangers of being hit by a pitch are apparent and well known: being hit can result in serious injury or, on rare tragic occasions, death"; and (3) "A defendant owes no duty of care to eliminate the inherent risks in a particular sport voluntarily played by the plaintiff."

Defendants presented these instructions based mainly on *Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148 (*Avila*). In *Avila*, the plaintiff alleged that during a community college baseball game he was injured when he was hit by an intentional "beanball" pitch thrown in retaliation for a previous hit batter or, at a minimum, was thrown negligently. (*Id.* at p. 152.) The plaintiff sued the community college district for whom the pitcher was playing at the time the incident occurred. (*Id.* at p. 153.)

In determining whether the district owed the plaintiff a duty of care, our Supreme Court discussed at length the inherent risks of playing organized baseball. The court stated: "Being hit by a pitch is an inherent risk of baseball. [Citations]. The dangers of being hit by a pitch, often thrown at speeds approaching 100 miles per hour, are apparent and well known: being hit can result in serious injury or, on rare tragic occasions, death." (*Avila*, *supra*, 38 Cal.4th at pp. 163-164, fn. omitted.)

The court then took its analysis one step further by stating: "Being *intentionally* hit is likewise an inherent risk of the sport, so accepted by custom that a pitch intentionally thrown at a batter has its own terminology: 'brushback,' 'beanball,' 'chin music.' In turn, those pitchers notorious for throwing at hitters are 'headhunters.' Pitchers intentionally throw at batters to disrupt a batter's timing or back him away from home plate, to retaliate after a teammate has been hit, or to punish a batter for having hit a home run." (*Avila*, *supra*, 38 Cal.4th at p. 164.)

The court thus concluded that the district did *not* owe a duty of care to the plaintiff. In reaching this holding, the court recognized that intentionally throwing at a batter is forbidden by the rules of baseball. (*Avila, supra*, 38 Cal.4th at p. 165.) However, the court stated: "It is one thing for an umpire to punish a pitcher who hits a batter by ejecting him from the game, or for a league to suspend the pitcher; it is quite another for tort law to chill any pitcher from throwing inside, i.e., close to the batter's body—a permissible and essential part of the sport—for fear of a suit over an errant pitch. For better or worse, being intentionally thrown at is a fundamental part and inherent risk of the sport of baseball. It is not the function of tort law to police such conduct." (*Ibid.*, fn. omitted.)

In light of the Supreme Court's statements regarding the inherent risks of baseball and the limitations of tort law to impose liability on participants playing the game, the special jury instructions in this case were correct statements of the law. Further, the trial court could reasonably conclude that these jury instructions were helpful because all of the members of the jury might not have been familiar with baseball or the limitations on defendants' duty towards plaintiffs.

Moreover, in reviewing plaintiffs' claims of instructional error, "we must not only determine whether the trial court committed error, but whether the error resulted in a 'miscarriage of justice.' " (*Zagami, Inc. v. James A. Crone, Inc.* (2008) 160 Cal.App.4th 1083, 1094; accord *Soule, supra*, 8 Cal.4th at pp. 573-574.) Although plaintiffs argued in their brief that the jury instructions were "totally confusing to the jury as to what they were to be comparing", they did not explain how or why the jury would be confused. Plaintiffs therefore failed to meet their burden of showing a miscarriage of justice.

5. *The Trial Court Did Not Commit Reversible Error In Connection With the Jury Question Relating to the Definition of the Product*

As stated, the jury asked the court the following question: "Does [the] helmet design ref[er] to the bill or the [dome] or [the] entire helmet[?]" The court responded: "The entire helmet."

Plaintiffs argue that the way the court answered this question "led the jury to believe that they were to weigh the benefits of wearing any helmet over no helmet rather than the benefits of wearing a properly designed helmet over a defective helmet."[9] We reject this argument.

The jury was asked in the special verdict form the following question: "Was the helmet's design a substantial factor in causing harm to Plaintiff Justin Fuss-McMullough?" The jury was further asked: "Did the risks of this helmet's design outweigh the benefits of the design?"

The jury's question to the court related to the term "helmet design" that was used in the two special verdict questions. The court's response that this term referred to the "entire helmet" was reasonable and accurate in light of the evidence presented at trial. There was no evidence that the bill of the helmet was designed, manufactured, distributed or sold separately from the rest of the helmet. Rather, it was an integral part of the helmet. The jury therefore was correctly instructed to determine whether the risks of the design of the entire helmet outweighed the benefits of the design of the entire helmet.

6. *There Was Substantial Evidence to Support the Jury's Verdict Regarding the Risk-Benefit Test*

"When we review a jury verdict, we apply the substantial evidence standard of review. All conflicts in the evidence are resolved in favor of the prevailing party, and all reasonable inferences are drawn in a manner that upholds the verdict." (*Holmes v. Lerner* (1999) 74 Cal.App.4th 442, 445.) As we shall explain, there was substantial evidence supporting the jury's finding that the risks of the Nike helmet's design did not outweigh the benefits of the design.

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[9] The jury was given CACI No. 1204 regarding the risk-benefit test. See footnote 5, *ante*.

Plaintiffs argue that the trial court committed reversible error by placing the risk-benefit analysis question on the verdict form because there was "no testimony on which the jury could have determined that the defense met their burden of proof on this issue." The premise of this argument is incorrect. Defendants did indeed produce evidence regarding the comparable risks and benefits of placing padding on the inside of the bill of the helmet. For example, Mr. Halstead testified that such padding would become a hazard in its own right because there was a danger that it could fall and block the player's vision. This was substantial evidence to support the jury's finding that the risks of this helmet's design did not outweigh the benefits of the design.

7. *The Trial Court Did Not Abuse Its Discretion By Not Issuing Monetary Sanctions Against Defendants and By Not Disqualifying Defense Counsel*

We review a trial court's order relating to monetary sanctions for alleged improper litigation conduct for abuse of discretion. (*Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390, 401.) The abuse of discretion standard of review also applies to the trial court's denial of a motion to disqualify counsel. (*McPhearson v. Michaels Co.* (2002) 96 Cal.App.4th 843, 851.)

Plaintiffs argue that it was improper for defendants' attorney to be present during Justin's mental examination on November 13, 2007. Code of Civil Procedure section 2032.010 et seq. governs physical and mental examinations of parties. Code of Civil Procedure section 2032.530, subdivision (b) provides: "Nothing in this title shall be construed to alter, amend, or affect existing case law with respect to the presence of the attorney for the examinee or other persons during the examination by agreement or court order." Existing case law, in turn, "makes it clear that, in most cases, counsel should not be permitted to attend a mental examination, even though the trial courts retain the discretion to allow counsel's presence in exceptional cases." (*Golfland Entertainment Centers, Inc. v. Superior Court* (2003) 108 Cal.App.4th 739, 747.)

Plaintiffs, however, have not cited any evidence in the record to suggest that defendants' counsel intentionally flaunted the law on November 13, 2007, or disobeyed a court order on that date. Rather, it appears that counsel simply did not understand the law. Furthermore, there does not appear to have been any prejudice to defendants. Counsel did not have any substantive communications with plaintiffs and the mental examination was promptly stopped once plaintiffs' objected. The trial court therefore acted well within its discretion in denying plaintiffs' request for monetary sanctions and plaintiffs' request to disqualify defendants' counsel.

8. *The Trial Court Did Not Commit Reversible Error By Allowing Defendants To Add a Medical Witness and By Allowing Defendants to Conduct Mental Examinations of Plaintiffs*

Plaintiffs contend that the trial court erroneously permitted defendants to add Dr. Auerbach as an expert after the simultaneous exchange of experts by the parties occurred pursuant to Code of Civil Procedure section 2034.010 et seq. Plaintiffs further contend that the court erroneously allowed defendants to conduct mental examinations of plaintiffs.

We do not reach the merits of plaintiffs' arguments. Plaintiffs' alleged mental suffering was not adjudicated at trial because the jury effectively found that defendants were not liable to plaintiffs. Accordingly, any error the trial court may have made relating to Dr. Auerbach or plaintiffs' mental examinations was harmless and not grounds for reversing the judgment.

DISPOSITION

The judgment is affirmed. Defendants are awarded costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J.